IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-482

TERRELL DON HUTTO, Director
Virginia State Department of Corrections
AND
J. D. COX, Superintendent,
Powhatan Correctional Center,

Petitioners,

V.

ROGER TRENTON DAVIS

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRELIMINARY STATEMENT

Roger Trenton Davis prays that a Writ of Certiorari to review a judgment of the United States Court of Appeals

for the Fourth Circuit entered on June 29, 1979, in the case of Roger Trenton Davis v. Jack F. Davis, be denied.

OPINIONS BELOW

The opinion of the Court of Appeals en banc is reported in 601 F.2d 153. The panel decision of the Court of Appeals is reported in 585 F.2d 1226. The opinion of the United States District Court is reported in 432 F.Supp. 444.

JURISDICTION

Same as cited by Petitioners.

STATUTES INVOLVED

§18.2-248. Penalties for manufacture, sale, gift, distribution or possession of a controlled drug. -- Except as authorized in The Drug Control Act, chapter 15.1 (§54-524.1 et seq.) of Title 54 of this Code, it shall be unlawful for any person to manufacture, sell, give, distribute or possess with intent to manufacture, sell, give or

distribute a controlled substance.

(a) Any person who violates this section with respect to a controlled substance classified in Schedules I, II or III shall upon conviction be imprisoned for not less than five nor more than forty years and fined not more than twenty-five thousand dollars; any person, upon a second or subsequent conviction of a violation of this section involving an opiate or synthetic opiate drug, may in the discretion of the court or jury imposing the sentence, be sentenced to confinement in the penitentiary for a term of life imprisonment or for any period not less than five years; provided that if such person prove that he gave, distributed or possessed with intent to give or distribute a controlled substance classified in Schedule I or II other than marijuana only as an accommodation

to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall be guilty of a Class 5 felony; and provided further, that if such person prove that he gave, distributed or possessed with intent to give or distribute marijuana or a controlled substance classified in Schedule III only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall be guilty of a Class 1 misdemeanor.

Provided, further, that if the violation of the provisions of this article consist of the filling by a pharmacist

of the prescription of a person authorized under this article to issue the same, which prescription has not been received in writing by the pharmacist prior to the filling thereof, and such written prescription is in fact received by the pharmacist within one week of the time of filling the same, or if such violation consists of a request by such authorized person for the filling by a pharmacist of a prescription which has not been received in writing by the pharmacist and such prescription is, in fact, written at the time of such request and delivered to the pharmacist within one week thereof, either such offense shall constitute a Class 4 misdemeanor.

(b) Any person who violates this section with respect to a controlled substance classified in Schedules IV, V or VI shall be guilty of a Class 1 misdemeanor. (Code 1950, §54-524.101:1;

1972, c.798; 1973, c.479; 1974, c.586; 1975, cc. 14, 15.)

§18.2-248.1. Penalties for sale, gift, distribution or possession with intent to sell, give or distribute marijuana. -- Except as authorized in the Drug Control Act, chapter 15.1 (§54-524.1 et seq.) of Title 54 of this Code, it shall be unlawful for any person to sell, give, distribute or possess with intent to sell, give or distribute marijuana.

(a) Any person who violates this section with respect to:

(1) Not more than one-half ounce of marijuana is guilty of a Class 1 misdemeanor;

(2) More than one-half ounce but not more than five pounds of marijuana is guilty of a Class 5 felony;

(3) More than five pounds of marijuana is guilty of a felony punishable

by imprisonment of not less than five nor more than thirty years.

Provided, that if such person prove that he gave, distributed or possessed with intent to give or distribute marijuana only as an accommodation to another individual and not with intent to profit thereby from any consideration received or expected nor to induce the recipient or intended recipient of the marijuana to use or become addicted to or dependent upon such marijuana, he shall be guilty of a Class 1 misdemeanor.

(b) Any person who gives, distributes or possesses marijuana as an accommodation and not with intent to profit thereby, to an inmate of a penal institution as defined in §53-19.18, or in the custody of an employee thereof shall be guilty of a Class 5 felony.

(c) Any person who manufactures

marijuana, or possesses marijuana with the intent to manufacture such substance, not for his own use is guilty of a felony punishable by imprisonment of not less than five nor more than thirty years (1979, c.435.)

§18.2-10. Punishment for conviction of felony. -- The authorized punishments for conviction of a felony are:

(a) For Class 1 felonies, death, or imprisonment for life.

(b) For Class 2 felonies, imprisonment for life or for any term not less than twenty years.

(c) For Class 3 felonies, a term of imprisonment of not less than five years nor more than twenty years.

(d) For Class 4 felonies, a term of imprisonment of not less than two years nor more than ten years.

(e) For Class 5 felonies, a term

of imprisonment of not less than one year nor more than ten years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both.

(f) For Class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both. (1975, cc.14,15; 1977, c.492.)

QUESTIONS PRESENTED

I. Should the Court review this case in light of the major revision of Virginia's marijuana statute, which reduces drastically the maximum penalties

for sale and felonious possession of marijuana?

II. Should the Court review this case when no new questions are presented concerning the authority of the federal courts to invalidate a state prison term?

III. Should the Court review this case when the standard of Eighth Amendment scrutiny exercised by the Fourth Circuit in Davis v. Davis, 601 F.2d 153 (4th Cir. 1979) does not constitute a variance from the standards employed in the other circuits?

IV. Should the Court review this case when the Court of Appeals was correct in finding that Respondent's sentence constituted cruel and unusual punishment?

STATEMENT OF THE CASE

Respondent, Roger Trenton Davis, was tried before a jury on March 18,

1974 in the Circuit Court of Wythe County, Virginia, and was convicted of distribution of marijuana and possession of marijuana with intent to distribute. Although the total quantity of marijuana involved in the two offenses was less than nine ounces, Davis was sentenced to twenty (20) years of imprisonment and fined Ten Thousand Dollars ($10,000.00) on each of the two charges, pursuant to Virginia Code §18.2-248. (Later amended, as will be discussed more fully below) The sentences were to be served consecutively. Davis filed a Petition for Writ of Error with the Supreme Court of Virginia, which denied his petition, thereby affirming the judgment of the lower court.

Davis then filed a petition for a writ of habeas corpus in the U. S. District Court for the Western District of Virginia. After a plenary hearing

there, Chief U.S. District Judge James C. Turk granted the writ, finding Davis' punishment to be cruel and unusual, thereby contravening the precepts of the Eighth Amendment. See Davis v. Zahradnick, 432 F.Supp. 444 (W.D.Va. 1977). The Commonwealth appealed to the U.S. Fourth Circuit, a three-judge panel of which initially reversing the district court in a decision authored by Judge Emory Widener. See Davis v. Davis, 585 F.2d 1226. Davis filed a petition for rehearing en banc, and on June 29, 1979 the Fourth Circuit, en banc, reversed the panel decision in a brief per curiam opinion, affirming the judgment of the District Court that the sentence imposed was grossly excessive and in violation of the Eighth Amendment.

Eads, the central figure in the apprehension of Davis, was then a

20-year-old convict who had sought a furlough from nearby Bland Correctional Center in order to assist in the arrest of several persons, one being the defendant, on drug-related charges. Eads testified on direct examination that he had sought a furlough so he could "bust" those persons selling drugs to his wife and to protect the welfare of his two-year old daughter. But on cross examination, while denying vehemently he had made a "deal" with the authorities, he admitted that he had been assaulted while incarcerated in Richmond prior to being transferred to Bland and that he had cut his wrists just before being denied a furlough in September, 1973. He also acknowledged on cross examination that his motive for offering assistance to the police was that of "getting [his] daughter away from [his] wife."

At the ore tenus hearing conducted July 6, 1976, in the District Court, Davis presented the expert testimony of Dr. Dorothy B. Whipple, a noted authority on children's diseases and author of many works on drugs and drug abuse. Dr. Whipple's testimony provided a scientific basis upon which to measure the alleged damage to society posed by the underlying offenses in question. Based on her many years of study of this area of medicine, Dr. Whipple stated unequivocally that the use of marijuana does not lead to physical or mental deterioration of the body and that the drug is not addicting in a physiological sense. She analogized the "habit-forming" effects of marijuana smoking to those of drinking a glass of orange juice for breakfast, noting that of all recreational drugs, such as alcohol and tobacco, marijuana "is probably the

least harmful." [Emphasis added]

On cross examination, Dr. Whipple was asked whether tetrahydrocannabinol (THC, the active chemical in marijuana) is toxic, to which she replied that "of all the psychoactive drugs, marijuana is the least likely to produce death." She pointed out that a person can die from alcohol quite easily given a big dose, but that no death has ever been reported in the United States due to marijuana alone. When asked whether criminal penalties were not a help to a young person in combatting peer pressure to smoke marijuana, Dr. Whipple responded that she thought that "the law has had absolutely no effect whatsoever in reducing the amount of marijuana used among youth." She further noted that while penalties for marijuana possession and usage have increased, during the same period of time the use of marijuana

has "crescendoed."

Pursuant to the Commonwealth's request that they be given an opportunity to produce their own expert testimony concerning the use and effects of marijuana, a de bene esse deposition was conducted on August 26, 1976, of Dr. William P. Moore, a clinical psychiatrist practicing in Jenkintown, Pennsylvania. He testified about particular studies he had performed and certain articles he had written on the subject of marijuana usage and its alleged harmful effects. On cross examination, Dr. Moore acknowledged that in both of his studies the subjects were primarily patients from upper middle-class families. Moore also admitted that only routine neurological tests were performed on his subjects and that less than half had been given the standard battery of psychological tests. Moore could not

deny that he based his findings upon his patients' own perceptions of their symptoms without any independent observation of those systems outside of the doctor's office.

Evidence was also presented in the District Court to show the number of persons convicted of drug-related offenses in Virginia and the lengths of sentences given for such offenses. A precise computation was introduced, through a stipulation, which specified that during the period between October 31, 1975 and August 19, 1976, out of a total of 117 inmates who were committed to the State for possessing, selling and/or manufacturing marijuana, the average sentence for these offenses was 3 years, 2 months; the maximum sentence was 15 years.

Further evidence as to the nature of punishment rendered in Virginia, and

elsewhere, was provided in a Supplemental Stipulation of Fact consisting of a letter from Thomas B. Baird, Jr., Esq., the Commonwealth's Attorney who prosecuted the cases against Davis in the Wythe County Circuit Court. Baird wrote that although he had heretofore strenuously opposed Davis' release, "the sentence now being imposed throughout the majority of the Commonwealth and the Nation for comparable acts of drug distribution are extremely light and in most cases, insignificant." He continued by stating, "[i]n view of such, I think a gross injustice would be done should I not recommend his immediate release with the remainder of his term suspended."

I.

RECENT AMENDMENTS TO VIRGINIA'S MARIJUANA LAW, REDUCING SUBSTANTIALLY THE PENALTIES FOR SALE AND FELONIOUS POSSESSION, HAVE

RENDERED MOOT ANY SERIOUS CONSTITUTIONAL QUESTIONS PRESENTED IN THE CASE AT BAR.

Despite Petitioners' assertions that this cause warrants serious consideration because of important federal and constitutional issues, the General Assembly of Virginia, in drastically curtailing penalties for marijuana-related offenses, has removed any important issue remaining for this Court to consider. Rather than punishing the felonious possession or distribution of any amount of marijuana with a wide range of from five to forty years in prison and fines up to $25,000.00, the current statute, effective July 1, 1979, makes felonious possession and distribution of marijuana in amounts ranging from one-half ounce up to five pounds, a Class 5 felony. Virginia Code §18.2-248.1. Class 5 felonies are punished with terms of imprisonment ranging from

one to ten years in prison or, in the discretion of the court or jury, up to 12 months in jail and a fine of not more than one thousand dollars, either or both. Virginia Code §18.2-10.

Not only has the range of punishment been narrowed significantly; in addition, under the facts of the present case, Davis' alleged crimes, involving only eight or so ounces, appear at the lower end of the current punishment spectrum. Furthermore, statistics produced at the hearing in the District Court below showed Davis' punishment to be far out of line with other cases in Virginia even under the old statute. A forty-year sentence for such a small quantity of marijuana was a true aberration even in Virginia as far back as 1974. The longest sentence was 15 years according to the data submitted by stipulation in the District Court.

Since the punishment imposed upon Davis is no longer possible under current law and since Davis' case was an anomaly even under the old statute, review of this case would be a purely academic exercise, impacting only on the peculiar facts of the case at hand.

II.

THE AUTHORITY OF THE FEDERAL COURTS TO INVALIDATE A STATE PRISONER'S SENTENCE WHICH IS FOUND TO CONSTITUTE A VIOLATION OF THE EIGHTH AMENDMENT HAS ALREADY BEEN ESTABLISHED BY THIS COURT.

Petitioners assert that the primary constitutional question presented by the current case is whether federal courts have the authority to subject state sentences to Eighth Amendment scrutiny, and to invalidate those sentences which are found to be violative of the Eighth Amendment. In making this contention, however, petitioners have overlooked a

series of Supreme Court decisions which have clearly upheld the power of the federal courts to review sentences of a term of years imposed by state courts and to invalidate those sentences which are found to be so excessive or disproportionate to the offense charged as to constitute cruel and unusual punishment. The Fourth Circuit's decision here to vacate the sentence and remand for resentencing is in strict conformity with this line of Supreme Court decisions. This case presents no new constitutional questions which would merit this Court's consideration.

It is now firmly established that "the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed." Coker v. Georgia, 433 U.S. 584, 592 (1977). In the recent series of death

penalty cases each of the Court's justices has embraced the principle of "proportionality of sentence" as an inherent component of the Eighth Amendment's prohibition against cruel and unusual punishment and has recognized the authority of the federal courts to review state court sentences to determine if the punishment is excessive or disproportionate to the offense. See Coker v. Georgia, Id. (White, Stewart, Blackman, Stevens JJ. plurality opinion); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (Stewart, Powell, Stevens J.J. plurality opinion); Furman v. Georgia, 408 U.S. 238, 272 n.14 (1972) (Brennan, J. concurring); Id. at 458 (Burger, Powell, Blackman, Rehnquist, JJ. dissenting opinion). It was precisely this established power of judicial review under the Eighth Amendment which constituted the basis for the Fourth Cir-

cuit's action below.

Petitioners must concede that the power of the federal courts to subject state sentences to Eighth Amendment scrutiny has been established with respect to life terms or death sentences. They contend, however, that the power and authority of federal courts to review sentences for a term of years imposed by state courts has not been established, and that therefore this Court should grant the petition for certiorari in order to determine this issue.

Though the Supreme Court has never overturned a state-imposed sentence for a term of years on Eighth Amendment grounds, it has considered such appeals and explicitly indicated the power of the federal courts to subject such punishments to Eighth Amendment scrutiny. As early as 1903, in Howard v. Fleming,

191 U.S. 126 (1903), this Court directly ruled upon a claim of three North Carolina defendants, each sentenced to a term of years for commission of common law fraud, that because the lengths of their sentences were disproportionate to the offenses, they constituted cruel and unusual punishment. The Court assumed, sub silentio, its authority under the Eighth Amendment to review a state-imposed sentence for a term of years, and proceeded to scrutinize the sentence, ultimately finding that the terms imposed passed constitutional muster.

Similarly, in Weems v. United States, 217 U.S. 349 (1909) the Court considered a challenge to a sentence on the grounds that both the condition and duration of imprisonment violated the Eighth Amendment. While basing its decision on a finding that the con-

ditions of the imprisonment constituted cruel and unusual punishment, the Court noted that, as a general principle, "imprisonment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment." Id. at 368. Thus, the Court has clearly delineated the authority of the federal courts to subject term of years sentences to Eighth Amendment scrutiny of both the conditions and duration of the punishment.

Petitioners further seek to distinguish the issues posed by the current case from established principles of Eighth Amendment review on the basis that respondent does not challenge the constitutionality of the Virginia statute under which he was sentenced, but merely the application of the statute in his particular case. Petitioners

fail to suggest, however, how this distinction should alter the established authority of the federal courts to protect the respondent's Eighth Amendment rights. It has been well established by this Court that a concededly valid statute may be subject to constitutional challenge on the grounds that its application in a particular case is unconstitutional. See e.g. Edwards v. South Carolina, 372 U.S. 229 (1963); Yick Wo v. Hopkins, 118 U.S. 356 (1886). Further, in Gregg v. Georgia, supra, the Court, in considering the constitutionality of a Georgia death penalty, declared the need for the Court to examine not only the constitutionality of the penalty per se but also the validity of the penalty as applied in that particular case. 428 U.S. at 173. Similarly, in Howard v. Fleming, supra, the Court did not hesitate to review the

length of the sentences imposed in that particular case after upholding the constitutionality of the statute under which the defendants were convicted. 191 U.S. at 136.

Respondent, therefore, contends that since this case presents no new issues not previously addressed by this Court, certiorari should be denied. To the extent that this Court might seek to reconsider or further define the authority of federal courts to review state imposed sentences under the proportionality criteria of the Eighth Amendment, the case of Rummel v. Estelle, 587 F.2d 651 (1978), cert. granted May 22, 1979 (No. 78-6386) presents a more appropriate for review. As will be discussed more fully below, Rummel involves a sentence imposed under a currently-existing state statute, unlike the case at bar.

III.

THE PROPORTIONALITY STANDARD EMPLOYED IN THE CURRENT CASE BY THE FOURTH CIRCUIT DOES NOT VARY SUBSTANTIALLY FROM THE EIGHTH AMENDMENT TESTS UTILIZED IN OTHER CIRCUITS.

In its decision below, the Fourth Circuit applied the four-pronged test for proportionality under the Eighth Amendment, first enunciated in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973) Petitioners assert that the Hart test which was adopted by the Fourth Circuit is drastically at odds with the proportionality standard utilized in the other circuits as outlined in Rummel v. Estelle, supra, and for this reason merits this Court's consideration of the case in order to reconcile the two standards of review. A closer comparison of the two standards reveals, how-

ever, that they are in harmony and do not present a sufficiently serious divergence between circuits so as to necessitate this Court's intervention.

In Hart v. Coiner, supra, the Fourth Circuit delineated four factors to be considered in judging the proportionality of a sentence under the Eighth Amendment:

1. The nature of the offense itself;
2. the legislative purpose behind the punishment;
3. a comparison of the punishment with the manner of punishment in other jurisdictions; and
4. a comparison of punishment available in the same jurisdiction for other offenses.

Id. at 140-142. Similarly, the Fifth Circuit in Rummel v. Estelle, supra,

explicitly adopted three prongs of the Hart test. 587 F.2d 655-56. Only with regards to the evaluation of the legislative purpose behind the statute does there appear any divergence between the circuits; a close examination of how this factor is applied in Hart and Rummel, however, clearly reveals that any difference between the circuits is largely illusory.

In Hart, and the current case, the circuit court held that it was necessary to consider the sentence imposed in light of the legislative purpose behind the statute in order to determine if the sentence was so disproportionate to the offense as to render the presumably valid legislative scheme irrational. Precisely the same consideration of legislative purpose is called for by the Court in Rummel, which stated that "[t]he legislature in our

society selects the punishment scheme and we are justified to strike down the the legislature's choice only when the petitioner demonstrates that the legislative choice has no rational basis...." 587 F.2d at 661. Thus both Rummel and Hart incorporate a consideration of the legislative purpose as part of the proportionality test.

To the extent that there is any substantive difference between the proportionality standards employed by the various circuits it is merely over the weight to be accorded a determination by the court that a significantly less severe punishment could have fulfilled the legislative purpose. In Hart and the current case, the Fourth Circuit held that a finding that a given sentence was unnecessary and that a significantly lesser sentence could fulfill the legislative purpose could be considered by

the court in determining the rationality of the legislative scheme. See Davis v. Zahradnick, supra, 432 F.Supp. at 452. In Rummel the court considered the role such a determination could play in the court's review of a sentence and held that a finding that a less severe sentence would suffice could not be used as an independent test on which to invalidate a sentence under the Eighth Amendment. 587 F.2d at 660-61. Since the Fourth Circuit in neither Hart nor Davis used the "necessity" standard as an independent test, but merely used it in its consideration of the rationality of the legislative scheme, the proportionality test articulated in those cases is not inconsistent with the standard outlined in Rummel.

IV.

THE COURT OF APPEALS WAS CORRECT IN FINDING THAT RESPONDENT'S SENTENCE CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT.

Since the Eighth Amendment bars a punishment as excessive and unconstitutional if it is grossly out of proportion to the severity of the crime, Coker v. Georgia, supra, 433 U.S. at 592, and that determination is to be made on an objective basis, Id., it is evident that Davis' sentence was cruel and unusual and that the Fourth Circuit's invalidation of that sentence was proper.

In measuring the validity of the punishment under the Hart/Rummel analysis, the first objective factor to be considered is the nature of the offense. See Hart, supra, 483 F.2d at 140 and Rummel, supra, 587 F.2d at 659. It must

be determined what potential harm to society or to the individual is posed by the possession and distribution of small quantities of marijuana under the particular facts of this case. The total quantity of the drug involved was less than nine ounces. As pointed out by the District Court below, there was "no element of violence and minimal, debatable danger to the person." Davis v. Zahradnick, supra, 432 F.Supp. at 452. (Emphasis added).

What emerged from the elaboration of medical testimony was the fact that Roger Davis committed what was essentially a victimless crime, even had the marijuana involved actually been consumed. There was no violence to person or property, and no harm of any kind was inflicted upon the person of anyone.

A second factor to be considered is a comparison of Davis' punishment with

that which he might have received in other jurisdictions for a similar offense. See Hart, supra, 483 F.2d at 141. Such comparisons evidence changing societal norms regarding the severity of the offense. A review of the marijuana penalties in this country in force at the time of the District Court's decision reveals that Davis' actual sentence of twenty (20) years for possession with intent to distribute exceeded the maximum penalty available in all but four states, irrespective of the quantity possessed for sale. Davis v. Zahradnick, supra, 432 F.Supp. at 453. Likewise, the sentence of twenty (20) years for distribution exceeds the maximum penalty available in all but eight states, irrespective of the quantity sold. Id. Even under the Federal law in force at that time, the maximum penalty for the first offense of possession with intent

to distribute and for distribution was only five years and up to $15,000 in fines. 21 U.S.C. §801, et seq.

In addition, the Virginia General Assembly, in following the trend across the country, has reformed its marijuana laws. As discussed above, it recently enacted Virginia Code §18.2-248.1 which reduced drastically the maximum allowable penalties for respondent's underlying offenses.

A third objective factor is a comparison of punishment available in the same jurisdiction for other offenses. Hart, supra, 483 F.2d. at 142. At the time of Davis' convictions, other offenses which carried maximum sentences of twenty years included: murder in the second degree; mob shooting, stabbing, etc. with intent to maim or kill; abduction; and attempt to poison with

intent to kill or injure. Va. Code Ann. §§18.1-23,-30,-37,-65. Voluntary manslaughter, wounding a person in attempting or commiting a felony, and taking indecent sexual liberties with children carried only five-year maximum sentences. Va. Code Ann. §§18.1-24,-68,-215(4).

When compared to the punishment Virginia provided for violent criminal activity, sentences of 20 years for possession with intent to sell and 20 years for distribution of a relatively harmless substance bore no rational relationship to the gravity of the offenses. The comparison of punishments in Virginia, particularly for many violent crimes, underscores the gross disproportionality of the sentences imposed upon the defendant here.

As a final touchstone, the reviewing court should consider the legislative

purpose behind the punishment in determining its constitutionality. Hart v. Coiner, supra, 483 F.2d at 141. The fact that the General Assembly drastically reduced the penalties imposed for the commission of these offenses clearly indicates a legislative sense that the purposes underlying the old marijuana statute could best be furthered by a greatly reduced punishment.

Thus, relying upon the fundamental four-point proportionality test used in Hart, the lower courts here were correct in finding the sentence of forty years and $20,000 in fines grossly excessive and violative of the Eighth Amendment to the U. S. Constitution.

CONCLUSION

The subsequent revision of the statute under which respondent was sentenced has seriously diminished the precedential importance of this case.

Additionally, the Fourth Circuit's review of the state's term of years sentence is soundly rooted in established legal principle and presents no new significant legal issues for this Court's consideration. The Fourth Circuit's application of the proportionality criteria of the Eighth Amendment was in conformity with the dictates of this Court and comports with the established rule in the other circuits. The decision to invalidate the sentence was, in light of this standard, fair, proper and accurate. For the foregoing reasons, certiorari should be denied and the judgment of the Court below should be affirmed.

Respectfully submitted,

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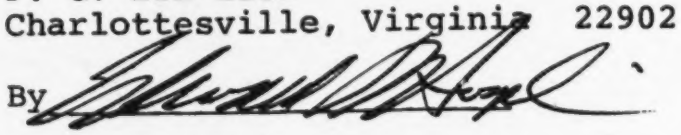
By 

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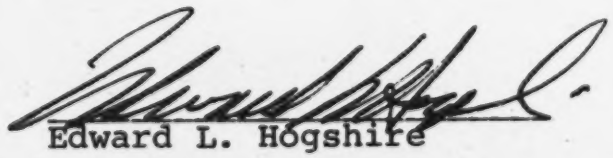
CERTIFICATE OF SERVICE

I, Edward L. Hogshire, counsel for Respondent, do hereby certify that on 22nd day of October, 1979, I mailed or delivered the requested copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to James E. Kulp, Esquire, Deputy Attorney General, 900 Fidelity Building, 830 E. Main Street, Richmond, Virginia.



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